Sheet Metal Workers' International Association, Local Union No. 162 *and* Dwight Lang's Enterprises, Inc. Case 32–CB–2847

August 29, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, DEVANEY, BROWNING, AND COHEN

Upon charges filed on December 4, 1987, by Dwight Lang's Enterprises, Inc., the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on December 16, 1987. The complaint alleges that the Respondent, Sheet Metal Workers' International Association, Local Union No. 162, violated Section 8(b)(1)(B) of the National Labor Relations Act by invoking the interest arbitration clause of the expired collective-bargaining agreement between the Respondent and the Northern San Joaquin Valley Chapter of the Sheet Metal and Air Conditioning Contractors National Association (SMACNA) after the Employer had timely withdrawn from membership in, and revoked its assignment of bargaining rights to, that multiemployer association. The complaint further alleges that the Respondent violated Section 8(b)(1)(A) of the Act. In his brief to the Board, the General Counsel contended that the Respondent violated Section 8(b)(1)(A) of the Act by attempting to enforce a union-security clause contained in the collective-bargaining agreement which was imposed by the interest arbitration award at a time when the Respondent was not the Section 9(a) representative of these employees and when the agreement it sought to enforce was not a voluntary Section 8(f) agreement privileged under *Deklewa*.[1]

On August 1, 1988, the General Counsel, the Respondent, and the Employer filed a stipulation of facts. The parties agreed that the charge, the complaint, the Respondent's answer, and the stipulation of facts, including attachments, constituted the entire record in this case and that no oral testimony was necessary or desired. The parties further stipulated that they waived a hearing and findings of fact, conclusions of law, and the issuance of a decision by an administrative law judge. The parties agreed that the Board should issue its decision containing findings of fact and conclusions of law.

On September 28, 1988, the Board issued an order approving the stipulation and transferring the proceedings to the Board. Thereafter, the parties filed briefs.[2]

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a California corporation with an office and principal place of business in Modesto, California, where it is primarily engaged in sheet metal, air conditioning, heating, plumbing, and pipefitting construction work. During the calendar year 1987, the Employer received in excess of $50,000 in supplies from suppliers located outside of California, which were shipped directly to the Employer's warehouse in Modesto or to jobsites in California. We find that Dwight Lang's Enterprises, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits, and we find, that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Stipulated Facts*

The Respondent entered into a collective-bargaining agreement with the Northern San Joaquin Valley Chapter of SMACNA (the Association) covering the period July 1, 1985, through June 30, 1987. The Association is composed of employers who are engaged in the purchase, distribution, transmission, installation, servicing, and sale of heating and air conditioning products. The agreement provided for the terms and conditions of employment for employees of employer-members of the Association as well as for employees of individual employers who executed the agreement as ''individual employers.'' At the time the Association and the Respondent entered into this agreement,

[1] *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[2] Following the filing of the briefs, the General Counsel filed a motion to withdraw the 8(b)(1)(A) allegation of the complaint. The General Counsel stated that his motion was made ''in the exercise of the General Counsel's prosecutorial discretion.'' Because the General Counsel moved to withdraw the 8(b)(1)(A) allegation after evidence had been introduced in support of the allegation, the General Counsel no longer had unreviewable discretion to withdraw. *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981 (1992). After evidence has been introduced, the judge, or in this case the Board, has discretion to either grant or deny a motion to withdraw a complaint allegation. Id. at 982; *General Maintenance Engineers*, 142 NLRB 295 (1963). Because the allegation has been fully litigated, we exercise our discretion and deny the General Counsel's motion. Contrary to our dissenting colleagues, however, we find that the 8(b)(1)(A) allegation lacks merit. Our dismissal of the 8(b)(1)(B) allegation compels dismissal of the 8(b)(1)(A) allegation as well. The 8(b)(1)(A) allegation turns on the 8(b)(1)(B) allegation that the Respondent unlawfully invoked the interest arbitration provisions of the predecessor agreement. We find, as discussed below, that the Respondent did not unlawfully invoke interest arbitration. Accordingly, the Respondent's attempt to enforce the union-security provisions of the collective-bargaining agreement that resulted from that interest arbitration did not violate Sec. 8(b)(1)(A).

the Employer was a member of the Association and had assigned its bargaining rights to it.[3]

The 1985–1987 collective-bargaining agreement contained an interest arbitration clause providing for arbitration of controversies or disputes arising out of the failure of the parties to negotiate a new or succeeding agreement. The interest arbitration clause included a provision establishing a procedure for submitting any such dispute to the National Joint Adjustment Board (NJAB).[4] The agreement also contained an expiration clause which provided that the agreement automatically renewed itself unless timely notice of reopening was given and that the contract expiration date (of June 30, 1987) would not be effective if proceedings under the interest arbitration clause had not been completed prior to that date.[5]

On January 21, 1987, the Employer withdrew its delegation of bargaining authority from the Association and notified it of its intention to bargain individually with the Respondent following the expiration of the collective-bargaining agreement on June 30, 1987. By letter dated March 26, 1987, the Employer notified both the Association and the Respondent that it intended to ''negotiate our own agreements upon expiration of our present agreements.'' Representatives of the Employer and the Respondent met once in May 1987 to discuss a successor contract, but no agreement was reached.

On July 2, 1987, the Employer notified each of its sheet metal employees and the Respondent that it was unilaterally changing the employees' terms and conditions of employment and, under recent Board authority,[6] it was under no obligation to bargain for a new contract. On July 9, 1987, the Respondent informed the Employer that it regarded the Employer as bound to the interest arbitration provision of the expired contract and that it intended to submit the parties' failure to arrive at a new agreement to the NJAB for resolution.

The Employer refused to recognize the NJAB's jurisdiction and refused to participate in the NJAB hearing on August 3, 1987. The Employer raised no specific objection to any specific terms of the contract proposed by the Respondent. About August 7, 1987, the NJAB rendered its award imposing a new collective-bargaining agreement on the parties to be effective from July 1, 1987, to June 30, 1989. That contract included an interest arbitration provision and a provision (art. V, sec. 1), carried over from the expired contract, requiring membership in the Respondent as a condition of continued employment. The award also included a proviso stating that any provision of the imposed collective-bargaining agreement found nonmandatory by the Board or a court would be deleted and referred back to the NJAB if the parties could not agree on a replacement for the disputed provision.[7]

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[3] The complaint alleges, and the answer admits, that, by virtue of its membership in the Association, the Employer was a ''party'' to the collective-bargaining agreement.

[4] The NJAB is composed of employers who are members of SMACNA and representatives of the Sheet Metal Workers' International Association.

Art. X, sec. 8, of the contract provides:

> SECTION 8. In addition to the settlement of grievances arising out of interpretation or enforcement of this agreement as set forth in the preceding sections of this Article, any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled as hereinafter provided:
>
> (a) Should the negotiations for a renewal of this Agreement become deadlocked in the opinion of the Union representative(s) or of the employer(s) representative, or both, notice to that effect shall be given to the National Joint Adjustment Board.
>
> If the Co-Chairmen of the [NJAB] believe the dispute might be adjusted without going to final hearing before the [NJAB], each will then designate a panel representative who shall proceed to the locale where the dispute exists as soon as convenient, attempt to conciliate the differences between the parties and bring about a mutually acceptable agreement. If such panel representative or either of them conclude that they cannot resolve the dispute, the parties thereto and the Co-Chairmen of the [NJAB] shall be promptly notified without recommendation from the panel representatives. Should the Co-Chairmen of the [NJAB] fail or decline to appoint a panel member or should notice of failure of the panel representatives to resolve the dispute be given, the parties shall promptly be notified so that either party may submit the dispute to the [NJAB].
>
> The dispute shall be submitted to the [NJAB] pursuant to the rules as established and modified from time to time by the [NJAB]. The unanimous decision of said Board shall be final and binding upon the parties, reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached. There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received written notification of its failure.

[5] Art. XIII of the contract provides:

> SECTION 1. This Agreement . . . shall continue in force from year to year [after the expiration date of June 30, 1987] unless written notice of reopening is given not less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served, this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party, provided, however, that the contract expiration date contained in this section shall not be effective in the event proceedings under Article X, Section 8 are not completed prior to that date. In that event, this Agreement shall continue in full force and effect until modified by order of the [NJAB] or until the procedures under Article X, Section 8 have been otherwise completed.

[6] *Deklewa*, supra.

[7] The text of the proviso reads:

> It is not the intent of the NJAB to impose any non-mandatory subjects of bargaining on an unwilling party. Therefore, in the event the NLRB or any court having jurisdiction over the matter finds any provision of the agreement imposed herein, to which an objection is raised, is not a mandatory subject of bargaining, that provision will be deleted. In such event the parties are directed to enter into negotiations to replace that provision of the contract with a mandatory provision. In the event the parties cannot agree upon a replacement for the disputed section, the NJAB retains jurisdiction to resolve that issue.

The Employer refused to comply with the award and filed a petition in state court to vacate it. The Respondent removed the case to Federal court and filed a counterpetition to confirm the award. Both petitions are currently pending.[8] On two occasions in November 1987, the Respondent requested information from the Employer about its current employees so that it could verify the Employer's compliance with the union-security clause of the contract imposed by the NJAB. The Employer has not complied with these requests.

The stipulation of facts does not state whether the 1985–1987 agreement was a Section 8(f) or a Section 9(a) agreement. However, in separate proceedings before the Board in which the Employer sought the processing of an employer (RM) petition under Section 9(c)(1)(B) of the Act, the Regional Director found that the parties had an 8(f) contract. Neither party sought review of that portion of the Regional Director's decision, and the Board affirmed it.[9]

B. *Contentions of the Parties*

The General Counsel contends that the Respondent's submission of the bargaining dispute to the NJAB for binding interest arbitration and its later efforts to enforce the resulting award in court violated Section 8(b)(1)(B) by forcing the Employer to relinquish its statutory right to select its own representatives for collective bargaining. The General Counsel points out that under the terms of article X, section 8, of the collective-bargaining agreement, the NJAB is empowered to resolve disputes ''arising out of the failure of the *parties* to negotiate a renewal agreement.'' (Emphasis added.) Thus, according to the General Counsel, the applicability of the interest arbitration provision is limited to those entities signatory to the agreement—the members of the Association and the Respondent. Since the Employer had timely withdrawn from the Association, the General Counsel argues that the Employer was no longer a ''party'' to the agreement to which article X, section 8, by its own terms applied. Moreover, the General Counsel contends, the Employer, having terminated its 8(f) relationship with the Respondent on July 2, 1987, no longer had a collective-bargaining relationship with the Respondent. Thus, the General Counsel argues, the Respondent's action in unilaterally invoking the interest arbitration provision must be seen as an attempt to substitute the NJAB for any bargaining representatives that the Employer might choose on its own behalf. Therefore, the General Counsel concludes the Employer is deprived of its right, under Section 8(b)(1)(B), to select its own bargaining representative.

The Employer argues that article X, section 8, forces an employer to consent to representation by a multiemployer bargaining group even after, as here, that employer has properly withdrawn bargaining authority previously granted to that group. According to the Employer, the Respondent, by unilaterally declaring a deadlock and invoking the contractual interest arbitration provision, has violated Section 8(b)(1)(B) by coercing it in the selection of its bargaining representative. The Employer also contends that the Respondent further violated Section 8(b)(1)(B) by attempting to enforce the NJAB-imposed agreement, which itself contained an interest arbitration clause through which the Employer would be forced to relinquish its bargaining authority in perpetuity.

The Employer contends that the grounds for these violations are not affected by *Deklewa* because the parties remained in a collective-bargaining relationship, notwithstanding that neither Section 8(a)(5) nor Section 8(b)(3) applied to their action. In the Employer's view, the continuing relationship was based on the Respondent's invocation of interest arbitration, the resulting collective-bargaining agreement imposed by NJAB, the Respondent's efforts to enforce that agreement in Federal court, and the Respondent's claim of majority status among the Employer's employees. Thus, concluded the Employer, the Respondent has demonstrated an intent to represent the Employer's employees and its actual purpose in invoking interest arbitration was to interfere with the Employer's selection of its bargaining representative.

The Respondent argues that the Employer's act of withdrawing from the Association which had freely negotiated the interest arbitration provision is not, contrary to the General Counsel's theory of the case, sufficient grounds for finding that the Respondent's later invocation of article X, section 8, constituted unlawful coercion of the Employer. The Respondent denies that the withdrawal from the multiemployer association can expunge article X, section 8, by stressing that there is no contingent term in the contract declaring that a change in bargaining representative (from the NJAB to some other representative) cancels the provisions of article X, section 8. Thus, according to the Respondent, there is no ''escape clause'' from the interest arbitration that the complaint reads into the collective-bargaining agreement.

C. *Analysis and Conclusions*

The central issue in this case is whether the Respondent, which had an 8(f) relationship with the Employer, violated Section 8(b)(1)(B) of the Act by (1)

[8] The Employer filed a reply to the counterpetition. On September 14, 1988, the court granted the Employer's motion to stay the proceedings pending the Board's decision.

[9] However, contrary to the Regional Director, the Board concluded that the RM petition should be processed since the Union claimed majority status after the expiration of the contract. (The decision was by unpublished order in Case 32–RM–570.) The Union lost the election and the Certification of Results to that effect issued on April 12, 1989.

unilaterally submitting unresolved bargaining issues between it and the Employer to the interest arbitration procedures contained in the 1985–1987 agreement after the Employer had timely withdrawn from and revoked its assignment of bargaining rights to the Association and notified the Respondent that it was under no obligation to bargain for a new contract and (2) filing a Federal court action to confirm the resulting arbitration award.[10] We find that the Respondent did not act unlawfully in either respect.

The analytical framework for resolving 8(b)(1)(B) allegations of this nature was established in *Electrical Workers IBEW Local 113 (Collier Electric)*,[11] which issued after this case was transferred to the Board. Under *Collier*, the Board considers whether the union has a reasonable basis in fact and law for submitting unresolved bargaining issues to interest arbitration. If such a basis exists—i.e., if the agreement arguably binds the employer to the interest arbitration provisions—the union may lawfully invoke its contract rights, including initiating court action to enforce any resulting contract. On the other hand, if the agreement does not arguably bind the employer to interest arbitration, then the union will unlawfully coerce the employer in the selection of its collective-bargaining representative, in violation of Section 8(b)(1)(B), by submitting unresolved bargaining issues to interest arbitration.[12]

Collier emphasized, however, that the presence of an interest arbitration clause in a collective-bargaining agreement does not relieve employers and unions of their responsibility to engage in good-faith bargaining. On proper invocation of its jurisdiction, the Board will review the bargaining for a renewal agreement to ensure that the parties have bargained in good faith before submitting any unresolved issues to interest arbitration.

[10] Though no 8(b)(1)(B) violation as to attempted court enforcement was alleged, we find on the basis of the stipulated facts and the briefs that the issue was fully litigated.

[11] 296 NLRB 1095 (1989).

[12] The *Collier* standard is consistent with the Supreme Court's holding in *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574, 582–583 (1960), that, consistent with the congressional policy in favor of settlement of disputes through arbitration, ''[a]n order to arbitrate [in a Sec. 301 suit to compel arbitration] the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.''

Chairman Gould finds that the policy favoring the peaceful settlement of disputes through arbitration expressed by the Supreme Court in the *Warrior & Gulf* case in the context of grievance arbitration applies with equal force to interest arbitration. In his view, that policy also compels the conclusion that interest arbitration is a mandatory subject of bargaining on which a party may insist to impasse. He would, therefore, overrule *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520 (1976), and other cases holding that interest arbitration is a nonmandatory subject of bargaining.

The *Collier* doctrine has met with court approval. In *West Coast Sheet Metal v. NLRB*,[13] the court examined the Board's decision in light of the statute and its legislative history and held that *Collier* was ''reasonable'' and ''consistent'' with the National Labor Relations Act.

The court declared that in Section 8(b)(1)(B), ''Congress was targeting union practices absent in *Collier Electric*, i.e., the conditioning of bargaining upon an employer's affiliation with a multiemployer association.'' 938 F.2d at 1362. The court stated that ''the Board could reasonably classify the peaceful, good-faith resort to legal process as a legitimate effort to preserve the fruits of prior industry-wide bargaining, not as unlawful 'restraint' or 'coercion.''' Id.

The court also rejected the argument that *Collier* is inconsistent with the clear and unmistakable waiver standard:

> We find this argument misguided. ''Waiver'' is a concept that operates to counter claims that a recognized right has been infringed; it does not apply beyond the scope of the right that has allegedly been invaded. In *Collier Electric*, however, the Board in effect decided that the employer's right at issue is not so sweeping as West Coast conceives it to be. On the Board's analysis, which we have found to be reasonable, [S]ection 8(b)(1)(B)'s ban on union ''restraint'' and ''coercion'' does not bestow upon an employer, who has withdrawn mid-term from a multiemployer association, any right to be free from a union's invocation, after bargaining in good faith to impasse, of an at least arguably applicable interest arbitration provision. In the present case, therefore, the Board had no occasion to determine whether West Coast had ''waived'' its [S]ection 8(b)(1)(B) right, ''clearly and unmistakably'' or otherwise; instead, the key question is simply whether Local 206 infringed that right, either by unreasonably invoking the interest arbitration clause, or by bargaining in bad faith before invoking the clause. [Id.]

Finding that the Board had reasonably answered that ''key question,'' the court affirmed the Board's dismissal of the unfair labor practice complaint.

Applying the *Collier* standard to the facts in this case, we find that the Respondent did not violate Section 8(b)(1)(B) by submitting negotiating issues to NJAB over the Employer's objection and seeking a court order binding the Employer to the terms of the collective-bargaining agreement set by the interest arbitration award. Our finding is consistent with the Board's findings in *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258 (1991); as well as

[13] 938 F.2d 1356 (D.C. Cir. 1991).

in *Sheet Metal Workers Local 54 (Texas Sheet Metal)*, 297 NLRB 672 (1990); and *Sheet Metal Workers Local 283 (Conditioned Air)*, 297 NLRB 658 (1990), where the unions were found to have acted lawfully by unilaterally submitting bargaining disputes to interest arbitration pursuant to contractual provisions virtually identical to those contained in article X, section 8, in this case.[14] For the reasons set forth in those decisions, we find that the contractual interest arbitration provisions here could arguably be interpreted as binding the Employer as a single employer on whose behalf the provisions were negotiated and agreed to by the Association when it was still a member of the Association and had not yet revoked the assignment of bargaining rights to the Association.[15]

We recognize that the parties' rights and obligations under 8(f) agreements are governed by *Deklewa*. However, for the reasons stated in *Baylor*, supra, we find that nothing in *Deklewa* mandates a different result. Here, as in *Baylor*, the introductory language of article X, section 8, requires submission to the NJAB following any ''failure of the parties to negotiate a renewal of this Agreement.'' We find that this language arguably binds the Employer to a renewal of the agreement and to the NJAB's resolution of disputes concerning that renewal. Arguably, by agreeing to the interest arbitration clause, the parties have agreed to extend their bargaining relationship beyond the contract's expiration date and thus the Employer's privilege under *Deklewa* to repudiate the relationship had not been triggered at the time of submission to the NJAB.

We further find that the Respondent did not violate Section 8(b)(1)(B) to the extent its submission to the NJAB might have included interest arbitration provisions in the prospective contract. In this regard, the stipulation of facts states that only one bargaining session took place between the Respondent and the Employer, and it does not indicate that the subject of interest arbitration came up at that meeting. The stipulation does not contain any description of the contract terms proposed by the Respondent to the NJAB; it does state that the Employer refused to participate in the NJAB proceeding and raised no specific objection to any of the terms in the Respondent's proposal. In its award, the NJAB simply directed the Employer to execute a collective-bargaining agreement containing the terms of the contract between the Respondent and the employers represented by the Association. In these circumstances, there is no basis for a finding that the Respondent specifically proposed the inclusion of an interest arbitration clause in the new contract, let alone that it insisted to impasse on such a term. Nor did the Respondent protest the limitation placed on the interest arbitration provisions by the NJAB in its award, that is, that any provision in the imposed collective-bargaining agreement found nonmandatory by the Board or a court would be deleted. Indeed, in its counterpetition for enforcement, the Respondent requested the court to confirm the award ''in all respects.''

In finding that the Respondent did not violate Section 8(b)(1)(B), we stress that we are not consigning the Employer to a ''perpetual cycle of binding interest arbitration.''[16] The NJAB award assures that neither party will be forced to accept, over its objection, any provision that is a nonmandatory subject of bargaining.[17] As interest arbitration is a nonmandatory subject, we find that the Employer is not required by the NJAB award to submit any additional unresolved disputes to interest arbitration.[18]

From these findings, it follows that the Respondent did not violate Section 8(b)(1)(B) by petitioning the court for enforcement of the NJAB award. As the Board noted in *Collier*, under the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), if a lawsuit has a reasonable basis in fact and law, the Board may not enjoin the suit, but must allow it to proceed. Here, as we have found, the Respondent's invocation of the interest arbitration proce-

[14] The difference appears in par. 8(a) (see fn. 4 above). Whereas here, the right to invoke interest arbitration is granted specifically to the Union and the ''employer(s) representative,'' in the earlier cases that right was granted to the union and the ''Local Contractors Association.''

[15] Art. X, sec. 8, of the contract does not contain language specifically stating that an employer who has withdrawn from the multiemployer association is no longer bound to the contractual interest arbitration procedures. Further, we note that it is not disputed that the Employer, by virtue of its membership in the Association, was a party to the 1985 agreement. Therefore, the contract's frequent references to the rights and obligations of the parties under art. X, sec. 8, establish, arguably, that the Employer is covered by the interest arbitration provisions of the contract.

The Respondent engaged in one session of collective bargaining with the Employer, and the stipulation of facts contains no indication that it would not have bargained further had the Employer not attempted to repudiate the bargaining relationship. Accordingly, there is no basis for finding that the Respondent failed to bargain in good faith; see *Collier*, 296 NLRB at 1098. In any event, there is no allegation that the Respondent violated Sec. 8(b)(3).

[16] See *Collier*, 296 NLRB at 1097 fn. 9.

[17] In light of that provision, our dismissal of the complaint should not be construed as a departure from Board law holding that it is unlawful to insist that another party be bound against its will to interest arbitration. See *Sheet Metal Workers Local 59 (Employers Assn.)*, supra.

Chairman Gould agrees, in the circumstances of this case, that the Employer is not required by the NJAB award to submit any additional unresolved disputes to interest arbitration. Although the Chairman would find interest arbitration clauses to be mandatory subjects of bargaining, his view is that when the parties entered into the agreement containing the interest arbitration clause, they were aware that Board precedent held such clauses to be nonmandatory subjects of bargaining and that any subsequent award imposing interest arbitration could not be imposed upon the parties without their mutual consent.

[18] *Tampa Sheet Metal Co.*, 288 NLRB 322, 325 (1988).

dures of the contract has a reasonable basis in fact and law, and we therefore will not interfere with the Respondent's attempt to enforce the arbitration award in court.

For these reasons, we find that the Respondent did not violate Section 8(b)(1)(B) of the Act and shall dismiss the complaint.[19]

CONCLUSIONS OF LAW

1. Dwight Lang's Enterprises, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, Sheet Metal Workers' International Association, Local Union No. 162, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(b)(1)(B) or Section 8(b)(1)(A) as alleged in the complaint.

ORDER

The complaint is dismissed.

MEMBERS STEPHENS AND COHEN, dissenting in part.

1. For the reasons set forth in Member Stephens' dissenting opinion in *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258 (1991), we would find that the Respondent violated Section 8(b)(1)(B) of the Act by submitting its unresolved dispute with the Employer to interest arbitration and by filing an action under Section 301 to enforce the NJAB's award, which included an interest arbitration provision.[1]

2. We join with the majority in denying the General Counsel's motion to withdraw the 8(b)(1)(A) allegations of the complaint. Unlike our colleagues, however, we find that the Respondent violated Section 8(b)(1)(A) by invoking the interest arbitration provisions of the expired collective-bargaining agreement and imposing on the Employer, without its consent, a successor agreement that included a union-security clause.

The Employer was, through its membership in the Association, party to prehire collective-bargaining agreements sanctioned by Section 8(f). On July 2, 1987, the Employer, relying on the then recently issued *Deklewa*, terminated its voluntary bargaining relationship with the Respondent. In response to the Employer's court efforts to vacate the NJAB arbitration award of August 7, 1987, the Respondent sought, through its counterpetition in Federal court, to enforce an arbitration award which imposed on the Employer's employees a collective-bargaining agreement containing a union-security clause at a time when the Respondent was not the Section 9(a) representative of these employees and when, in our view, the Employer had not agreed to be bound by the agreement containing the clause. By these actions the Respondent violated Section 8(b)(1)(A), as alleged.

[19] We emphasize that our dismissal of the complaint does not require that the Employer engage in multiemployer bargaining. The Employer timely and unequivocally revoked its assignment of bargaining authority from the Association and specifically elected to bargain as an individual employer. That was its privilege; see *Retail Associates*, 120 NLRB 388 (1958). Moreover, as we have seen, the NJAB award expressly disclaims any intention to impose nonmandatory terms on an unwilling party. As the selection of a multiemployer organization as an individual employer's bargaining representative is a nonmandatory subject, it is evident that the award was not intended to force the Employer to engage in further bargaining through the Association. See, e.g., *Retail Clerks Union Local 770 (Fine's Food Co.)*, 228 NLRB 1166, 1170 (1977).

Finally, as we noted in fn. 9, above, an election was held among the Employer's employees after the NJAB had rendered its decision, and the Respondent lost. When the Respondent lost the election, the contract imposed by the NJAB was voided, and the parties' 8(f) relationship came to an end. *Deklewa*, 282 NLRB at 1385.

[1] Whether or not the Respondent included an interest arbitration provision in its submission to NJAB, it is clear that the NJAB award included an interest arbitration provision, and that, by means of its court action to compel enforcement of the award, the Respondent attempted to impose interest arbitration on the Employer without the latter's consent.

Our colleagues ''emphasize'' that dismissal of the complaint does not require that the Employer engage in multiemployer bargaining. However, the critical fact is that the dismissal deprives the Employer of its statutory right to bargain through representatives of its own choosing.